Supreme Court, U.S.
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October 1, 2008 Term

No.

In The Supreme Court of the United States of America

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY
Petitioner,

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA,
GENERAL COURT OF JUSTICE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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DECEMBER 19, 2008

Petitioner, Pro Se

THE QUESTIONS PRESENTED FOR REVIEW

Petitioner presents five questions for review by the Supreme Court of the United States as to whether the due process and equal protection rights of Petitioner as guaranteed by the Fourteenth Amendment of the United States, U.S. Const. Amend XIV, were violated by the following:

(i) The suspension of discovery and the hearing of Respondent's Motion for Summary Judgment before the close of evidence;

(ii) The failure of the North Carolina Industrial Commission and the General Court of Justice of North Carolina to provide relief by injunction and intervention to prevent Respondent from destroying evidence relevant to these proceedings during the pendency of these proceedings, and the subsequent destruction of evidence relevant to these proceedings during the pendency of these proceedings;

(iii) The failure of the North Carolina Industrial Commission and the General Court of Justice of North Carolina to adjudicate the objections of Petitioner as to the genuine issues of material fact and triable issues of fact as to the time, place, circumstance and nature of the personal injury of Petitioner in question presented at the hearing for Respondent's Motion for Summary Judgment;

(iv) The opinion, decision and dismissal classifying Petitioner as subject to the exclusive remedies of the North Carolina Workers' Compensation Act without validation or certification that the personal injury of Petitioner qualified for such remedies; and

(v) The opinion, decision and dismissal eliminating Petitioner's common law claim for civil remedy against his employer, Respondent, pursuant to the exclusivity provisions of the North Carolina Workers' Compensation Act, without adjudicating if the North Carolina Workers' Compensation Act provided an effective administrative remedy.

PARTIES TO THIS PROCEEDING

Petitioner in this matter is J. Kamau Christopher a/k/a Joseph Kamau Christopher Bey, represented *Pro Se.*

Respondent Courts in this matter are the Supreme Court of North Carolina, General Court of Justice of North Carolina; the Court of Appeals of North Carolina, General Court of Justice of North Carolina; and the North Carolina Industrial Commission, North Carolina Department of Commerce.

Respondent in this matter is the State of North Carolina; The Government of the State of North Carolina; Michael F. Easley, In His Official Capacity as the Governor of the State of North Carolina, Principle Executive Officer of the Executive Branch of the Government of the State of North Carolina; and other duly authorized officers, agents and employees of the Government of the State of North Carolina acting in their official capacity in the scope of their employment as public servants; The University of North Carolina; Erskine B. Bowles, In His Official Capacity as President, Principle Executive Officer of the General Administration of the University of North Carolina; and other duly authorized officers, agents and employees of the University of North Carolina acting in their official capacity in the scope of their employment as public servants; North Carolina State University, constituent institution of the University of North Carolina; James L. Oblinger, In His Official Capacity as the Chancellor, Principle Executive Officer of North Carolina State University; Marye Anne Fox,

In Her Official Capacity as the former Chancellor, Principle Executive Officer of North Carolina State University; Charles Leffler, in His Official Capacity as Vice Chancellor for Finance and Business, Office of Finance and Business, North Carolina State University; Kevin J. MacNaughton, in His Official Capacity as Associate Vice Chancellor for Facilities, Division of Facilities, Office of Finance and Business, North Carolina State University; Bruce L. MacDonald, in His Official Capacity as Health & Safety Manager, Environmental Health & Safety Center, North Carolina State University; Thomas H. Stafford. in His Official Capacity as Vice Chancellor for Student Affairs, Office of Student Affairs, North Carolina State University; Timothy Luckadoo, Ph.D., in His Official Capacity as Associate Vice Chancellor for University Housing, University Housing, Office of Student Affairs, North Carolina State University; Susan Grant, Director of University Housing, University Housing, North Carolina State University; Gary Thompson, in His Official Capacity as former Assistant Director of Facility Operations, University Housing, and former Associate Director of Facility Operations, University Housing, Office of Student Affairs, North Carolina State University; Timothy Blair, in His Official Capacity as former Assistant Director for Avent Ferry Complex and Wood Hall, East Campus, former Associate Director of East Campus, current Associate Director of University Apartments, University Housing, Office of Student Affairs, North Carolina State University; and other duly authorized officers, agents and employees of the North Carolina State University acting in their official capacity in the scope of their employment as public servants.

Counsel for the Respondent is Dahr Joseph Tanoury, Esq., Assistant Attorney General, Tort Claims Section, Office of the Attorney General of the State of North Carolina; Elizabeth W. Riley, Esq., Deputy Legal Counsel, Office of Legal Counsel, Office of the Governor of the State of North Carolina; Laura Bernstein Luger, Esq., Vice President and General Counsel, The University of North Carolina System General Administration; David T. Drooz, Senior Associate General Counsel, Office of Legal Affairs, North Carolina State University.

Note: In the original affidavit of tort claim, which initiated this action, Respondent was cited as North Carolina State University, with statutory reference to negligent acts performed by officers, agents and/or employees of Respondent in their official capacity as public servants. See N.C. Gen. Stat. § 143-291 et seq. Pursuant to the controlling law and statutory authority, the executive authority of Respondent is exclusively vested in the Governor of the State of North Carolina and derives from the Constitution of the State of North Carolina, and controlling law and legal authority for the public entity of North Carolina State University designates Respondent as subject to executive authority and a constituent institution of the University of North Carolina. See N.C. Const. art. IX, § 8; N.C. Gen. Stat. § 116-1 et seq.

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PETITION FOR WRIT OF CERTIORARI

Pursuant to the Rules of this Court and the All Writs Act (28 U.S.C. §§ 1257, 1651), J. KAMAU CHRISTOPHER a/k/a JOSEPH KAMAU CHRISTOPHER BEY (hereinafter referred to as the "Petitioner") hereby respectfully petitions the SUPREME COURT OF THE UNITED STATES to review the final judgment in this matter entered by the SUPREME COURT OF NORTH CAROLINA in favor of NORTH CAROLINA STATE UNIVERSITY, as a subordinate public office and entity in the GOVERNMENT OF THE STATE OF NORTH CAROLINA (hereinafter collectively referred to as the "State of North Carolina", the "State", the "Government", individually, or collectively and jointly, the "Respondent" or "Respondents") affirming judgment dismissing the instant action filed with the NORTH CAROLINA INDUSTRIAL COMMISSION with prejudice.

OPINIONS BELOW

The opinions and orders of the SUPREME COURT OF NORTH CAROLINA are unpublished (Pet. App. 23a-25a). The opinions and orders of the COURT OF APPEALS OF NORTH CAROLINA are unpublished (Pet. App. 14a-22a). The opinions and orders of the NORTH CAROLINA INDUSTRIAL COMMISSION are unreported (Pet. App. 1a-13a).

JURISDICTION

On September 4, 2008, the SUPREME COURT OF NORTH CAROLINA entered a judgment and order dismissing the Notice of Appeal and denying the Petition for Discretionary Review upon Certification filed by Petitioner (Pet. App. 23a-25a, 102a-144a). No pleading was filed with, nor order made by, the SUPREME COURT OF NORTH CAROLINA, with respect to a rehearing of this matter. This Court is authorized to review a federal question that has been passed upon by a state court of last resort where Petitioner has claimed a violation of any reserved and guaranteed rights, privileges, and immunities under the Constitution and the All Writs Act. See U.S. Const. art. III; 28 U.S.C. §§ 1257, 1651.

STATUTORY PROVISIONS INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV § 1.

STATEMENT OF CASE

I. Summary of Federal Question

The decisions below presents significant federal questions as to the constitutional validity of exclusions and immunities provided to employers and co-employees by universally mandated exclusive legislative industrial insurance programs, commonly referred to as "workers' compensation" (hereinafter referred to as the "Programs"). In *New York C. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917), this Court held that the Programs are not repugnant to the provisions of the Constitution, so long as the Programs provide an "adequate substitute" for the prohibited common law claims for civil remedy for personal injury by industrial accident in the workplace. The GENERAL COURT OF JUSTICE OF NORTH CAROLINA, comprised of the SUPREME COURT OF NORTH CAROLINA (hereinafter referred to as the "N.C. Supreme Court"), the COURT OF APPEALS OF NORTH CAROLINA (hereinafter referred to as the "N.C. Court of Appeals"), and various superior and district courts covering all jurisdictions within the State of North Carolina (hereinafter collectively referred to as the "N.C. Courts"), has applied this principle in *Johnson and Smith v. First Union Corporation*, 128 N.C. App. 450, 496 S.E.2d 1 (1998), cert. denied, 351 N.C. 648; 543 S.E.2d 870 (2000) and *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980), cert. denied, 301 N.C. 86 (1980), where it was held that if the North Carolina Workers' Compensation Act (hereinafter referred to as the "N.C.W.C.A.") has no application and does not

provide an "effective administrative remedy", the N.C.W.C.A. and the exclusivity provisions thereof have no application or effect to bar a common law claim for civil remedy against an employer or co-employee. See N.C. Gen. Stat. § 97-1 et seq.

In the instant case, Petitioner duly presented numerous objections showing that, despite the fact that Petitioner was employee of Respondent at a certain time in question with respect to the personal injury in question, the N.C.W.C.A. does not provide an effective administrative remedy, and thus has no application to bar the common law claim for civil remedy filed against Respondent in the instant case (Pet. App. 26a-177a; Record 32-175, 177-213, 280, 291-297). Despite these objections, the N.C. Courts passed on this appeal and these federal questions without adjudication of the objections presented and without significant or adequate finding of fact on the personal injury in question (Pet. App. 1a-177a, Record 32-175, 177-213, 280, 291-297). This dismissal was based solely on the grounds of the relationship between Petitioner and Respondent (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297).

Petitioner contends that N.C.W.C.A. does not provide an adequate substitute for a common law claim for civil remedy in the instant case, and, thus, this decision does not comport with the previous holdings of this Court to insure that the interpretation and official action in invoking the relevant provisions of the N.C.W.C.A. complies with the provisions of the Constitution of the United States of America, primarily the Fourteenth Amendment provisions for due process and equal protection (Pet. App. 26a-177a, Record 32-213, 280-

297). Moreover, the U.S. Court of Appeals has also held that a crucial federal question exist as to if all remedies at law can be eliminated by the exclusivity provisions of a workers' compensation law where workers' compensation is ineffective. *Dunlavey v. Economy Fire & Casualty Co.*, 887 F.2d 893 (8th Cir., 1989). Various state courts of last resort have also decided this important federal question, but there are widespread inconsistencies between the construction of the relevant statutes, the remedies provided, and the exceptions to the relevant exclusivity provisions (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297). In many jurisdictions, the original concept of the Programs was to provide employees with guaranteed benefits for injuries in the workplace (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297). At present, the Programs provide employers with immunity from all liability, even if the employee's benefits provided by the Programs are not an adequate substitute for the forfeiture of common law remedy, and without regard for employees' rights to due process (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297). It is critical that this Court address these inconsistencies to insure that constitutional protections provided to all citizens of the United States are not violated by the letter of, or official state action in administration of, the Programs. See Pet. App. 1a-177a; Record 32-175 (Petitioner's Response to Respondent's Motion for Summary Judgment and Motion to Suspend Discovery, and Petitioner's Cross Motion to Compel Discovery), 177-213, 280 (Petition for Extraordinary Relief before the North Carolina Court of Appeals), 291-297 (Assignments of Error for Appeal before the North Carolina Court of Appeals).

II. Statutory Background

All states and districts within the United States of America have adopted Programs that are universal mandates from their respective elected legislatures which guarantee expeditious universal industrial insurance for lost wages for all persons as "employees", adult or minor, in legal or illegal employment, a citizen or non-citizen, when "injured" by "accident" which "arises out of and in the course of the employment" (hereinafter referred to as an "industrial accident") in exchange for the forfeiture by statutory limitation of the right to seek a common law claim for civil remedy against the employer or co-employee, or any other legal entity bound to the employer by law (hereinafter referred to as the "exclusivity provisions"). Ala. Code § 25-5-1 et seq.; Alaska Stat. § 23.30.001 et seq.; Ariz. Rev. Stat. § 23-901 et seq.; Ark. Code Ann. § 11-9-101 et seq.; Cal. Lab. Code Ann. § 3200 et seq.; Colo. Rev. Stat. § 8-40-101 et seq.; Conn. Gen. Stat. § 31-291 et seq.; Del. Code Ann., Tit. 19,§ 2301 et seq.; D.C. Code Ann. § 32-1501 et seq.; Fla. Stat. § 440.01 et seq.; Ga. Code Ann. § 34-9-1 et seq.; Haw. Rev. Stat. § 386-1 et seq.; Idaho Code § 72-101 et seq.; Ill. Stat. Ann. 820, § 305/1 et seq.; Ind. Code Ann. § 22-3-1-1 et seq.; Iowa Code Ann. § 85.1 et seq.; Kan. Stat. Ann. § 44-501 et seq.; Ky. Rev. Stat. Ann. § 342.001 et seq.; La. Rev. Stat. Ann. § 23:1021 et seq.; Me. Rev. Stat., Tit. 39-A, § 101 et seq.; Md. Code Ann., Lab. & Empl., § 9-101 et seq.; Mass Gen. Laws c. 152, § 1 et seq.; Mich. Comp. Laws Ann. § 418.101 et seq.; Minn. Stat. Ann. § 176.0001 et seq.; Miss. Code Ann. § 71-3-1 et seq.; Mo. Rev. Stat. § 287.010 et seq.; Mont. Code Ann. § 39-71-101 et seq.; Neb. Rev. Stat. § 48-101 et seq.;

Nev. Rev. Stat. Ann. § 616.010 et seq.; N.H. Rev. Stat. § 281-A:1 et seq.; N.J. Stat. Ann. § 34:15-1 et seq.; N.M. Stat. Ann. § 52-1-1 et seq.; N.Y. Workers' Comp. Law § 1 et seq.; N.C. Gen. Stat. § 97-1 et seq.; N.D. Cent. Code, § 65-01-01 et seq.; Ohio Rev. Code Ann. § 4123.01 et seq.; Okla. Stat., Tit. 85, § 1 et seq.; Or. Rev. Stat. § 656.001 et seq.; Pa. Stat. Ann., Tit. 77, § 1 et seq.; R.I. Gen. Laws § 28-29-1 et seq.; S.C. Code Ann. § 42-1-10 et seq.; S.D. Codified Laws § 62-1-1 et seq.; Tenn. Code Ann. § 50-6-101 et seq.; Tex. Lab. Code Ann. § 401.001 et seq.; Utah Code Ann. § 34A-2-101 et seq.; Vt. Stat. Ann., Tit. 21, § 601 et seq.; Va. Code Ann. § 65.2-100 et seq.; Wash. Rev. Code Ann. § 51.04.010 et seq.; W. Va. Code Ann. § 23-1-1 et seq.; Wis. Stat. Ann. § 102.01 et seq.; Wyo. Stat. Ann. § 27-14-101 et seq. The territories and independent jurisdictions of the American Samoa, Guam, Navajo Nation, North Mariana Islands, Puerto Rico, and United States Virgin Islands all have adopted similar Programs. A.S.C.A. §§ 32.0501 et seq.; Guam Code Ann., Tit. 22, § 9101 et seq.; N.N.C.A., Tit. 15, § 1001 et seq.; N. Mar. I. Code, Tit. 4, § 9329 et seq.; P.R. Laws Ann., Tit. 11, § 1 et seq.; Virgin Islands Code, Tit. XXIV, § 250 et seq. The federal government also administers Programs that provide similar relief for federal employees and other specific groups of private employees. See 30 U.S.C. § 901 et seq.; 5 U.S.C. § 8101 et seq.; 33 U.S.C. § 901 et seq.; 42 U.S.C. § 7384 et seq.; 45 U.S.C. § 51 et seq.

It is well established that the Programs and exclusivity provisions are a constitutional use of state police power, and that the threshold question of compensation depends on the nature of the injury in question. See *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571,

35 S. Ct. 167, 59 L. Ed. 364 (1915); *New York C. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *Arizona Employers' Liability Cases*, 250 U.S. 400, 39 S. Ct. 553, 63 L. Ed. 1058 (1919); *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S. Ct. 227, 63 L. Ed. 527 (1919); *Lower Vein Coal Co. v. Industrial Board of Indiana*, 255 U.S. 144, 41 S. Ct. 252, 65 L. Ed. 555 (1921); *Ward & Gow v. Krinsky*, 259 U.S. 503, 42 S. Ct. 529, 66 L. Ed. 1033 (1922); *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923); *Heavner v. Town of Lincolnton*, 202 N.C. 400, 162 S.E. 909, appeal dismissed, 287 U.S. 672, 77 L. Ed. 579, 53 S. Ct. 4 (1932). However, in *New York C. R. Co. v. White*, this Court held that the provisions of any Program providing exclusive remedy must provide an "adequate substitute" to remedy at common law. 243 U.S. 188.

N.C. Courts further have established that the N.C.W.C.A. has to provide an "effective administrative remedy" in order to apply to bar a common law claim against an employer, and that intentional torts, and "intentional misconduct" which is defined as "misconduct substantially certain to cause serious injury or death", committed by the employer do not bar a common law claim against the employer. See *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980), cert. denied, 301 N.C. 86 (1980); *Johnson and Smith v. First Union Corporation*, 128 N.C. App. 450, 496 S.E.2d 1 (1998), cert. denied, 351 N.C. 648; 543 S.E.2d 870 (2000); *Richardson v. North Carolina Dept. of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-4,

301 S.E.2d 359, 365 (1983); *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

Moreover, in following the holdings of this Court, the N.C. Courts have established that the threshold question for the application of the N.C.W.C.A. is the injury in question, and that all parties have the substantial right to discover and present evidence relevant to the proceedings before judgment in order to examine the applicability of the N.C.W.C.A. See *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985); *Hargus v. Select Foods, Inc.*, 271 N.C. 369, 156 S.E.2d 737 (1967); *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964); *McNeely v. Carolina Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934); *Lovette v. Reliable Mfg. Co.*, 262 N.C. 288, 136 S.E.2d 685 (1964); *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971); *Ruffin v. Compass Group USA*, 150 N.C. App. 480, 563 S.E.2d 633 (2002); *Harden v. Thomasville Furn. Co.*, 199 N.C. 733, 155 S.E. 728 (1930); *Massey v. Board of Educ.*, 204 N.C. 193, 167 S.E. 695 (1933); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977); *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Fender v. G.E. Co.*, 260 F. Supp. 75 (W.D.N.C. 1966); *Fender v. G.E. Co.*, 380 F.2d 150 (4th Cir. 1967); *Wright v. Wilson Mem. Hosp.*, 30 N.C. App. 91, 226 S.E.2d 225 (1976); *Horne v. G.E. Co.*, 716 F.2d 253 (4th Cir. 1983); *Dolbrow v. Holland Indus., Inc.*, 64 N.C. App. 695, 308 S.E.2d 335 (1983); *Freeman v. SCM Corp.*, 311 N.C. 294, 316 S.E.2d 81 (1984); *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985); *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 510 S.E.2d 388 (1999); *Whitaker v. Town of*

Scotland Neck, 357 N.C. 552, 597 S.E.2d 665 (2003); *Powers v. Robeson County Memorial Hospital, Inc.*, 242 N.C. 290, 87 S.E.2d 510 (1955). As this Court found in *New York C. R. Co. v. White*, the original governmental rational and reasoning behind legislative industrial insurance was to ensure swift and guaranteed compensation for personal injury arising from an industrial accident for the employee in exchange for forfeiture, forever and always, the right to bring a common law action against the employer for same. 243 U.S. 188. This was to ensure that workers received adequate benefits for injury, particularly when negligence is questionable or the the injury was purely caused by accident, in which case the employee would typically receive no remedy under common law. *Id.* However, since 1917, the Programs have evolved from legislative industrial insurance to become legislative industrial accident insurance.

In Maine, Nebraska, Nevada, Rhode Island, American Samoa, the Navajo Nation and the Northern Mariana Islands, common law claims for intentional tort against an employer are exclusively barred without exception, but remedies for all work-related injuries, even those arising from intentional tort of the employer or a co-employee, qualify for compensation. *Cole v. Chandler*, 2000 ME 104, 752 A.2d 1189 (2000); *Ihm v. Crawford & Co.*, 254 Neb. 818, 580 N.W.2d 115 (1998); *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870; 8 P.3d 837 (2000); *Cianci v. Nationwide Ins. Co.*, 659 A.2d 662 (R.I. 1995); *Etimani v. Samoa Packing Co.*, 19 A.S.R.2d 1 (1991); *Nez v. Peabody Western Coal Co., Inc.*, 7 Nav. R. 416 (1999); *Santos v. Public Sch. Sys.*, 2002 MP 12; 6 N.M.I. 422 (2002).

In most other jurisdictions, including the remaining States, District of Columbia, Guam, Puerto Rico and U.S. Virgin Islands, where the Programs only provides remedy for personal injury by industrial accident, claims for personal injury or tort, such as claims of retaliation, intentional tort, intentionally inflicted emotional distress, and gross misconduct or negligence, such as sexual harassment or sexual assault, which do not "arise" by industrial accident are not barred by the exclusivity provisions, as the statutes do not provide adequate remedy, and thus do not apply. *Vacanti v. State Comp. Insurance Fund*, 24 Cal. 4th 800, 14 P.3d 234, 102 Cal. Rptr. 2d 562 (2001); *Rodriguez v. Naylor Industries, Inc.*, 763 S.W.2d 411 (Tex. 1989); *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152; 412 N.E.2d 934; 432 N.Y.S.2d 879 (1980); *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455; 564 N.E.2d 1222 (1990); *Fenner v. Municipality of Anchorage*, 53 P.3d 573 (Alaska 2002); *Ford v. Revlon, Inc.*, 153 Ariz. 38; 734 P.2d 580 (1987); *Gourley v. Crossett Pub. Sch.*, 333 Ark. 178; 968 S.W.2d 56 (1998); *DeOliveira v. Liberty Mut. Ins. Co.*, 273 Conn. 487; 870 A.2d 1066 (2005); *Grillo v. National Bank of Washington*, 540 A.2d 743 (D.C. 1988); *Iddings v. Mee-Lee*, 82 Haw. 1; 919 P.2d 263 (1996); *Tippmann v. Hensler*, 716 N.E.2d 372 (Indiana 1999); *Nelson v. Winnebago Indus.*, 619 N.W.2d 385 (Iowa 2000); *Stemple v. Md. Cas. Co.*, 282 Kan. 405; 144 P.3d 1273 (2006); *Moore v. Envtl. Constr. Corp.*, 147 S.W.3d 13; (Kentucky 2004); *Cole v. Dep't of Public Safety & Corr.*, 825 So. 2d 1134 (La. 2002); *Young v. Hartford Acci. & Indem. Co.*, 303 Md. 182, 492 A.2d 1270 (1985); *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1; 398 N.W.2d 882 (1986); *Hildebrandt v. Whirlpool Corp.*, 364 N.W.2d

394 (Minn. 1985); *Blailock v. O'Bannon*, 795 So. 2d 533 (Miss. 2001); *Burns v. Smith*, 214 S.W.3d 335 (Mo. 2007); *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148; 609 P.2d 257 (Mont. 1980); *Karch v. Baybank FSB*, 147 N.H. 525; 794 A.2d 763 (2002); *Millison v. E. I. Du Pont de Nemours & Co.*, 101 N.J. 161; 501 A.2d 505 (1985); *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272; 2001 NMSC 34; 34 P.3d 1148 (2001); *Zimmerman v. Valdak Corp.*, 1997 ND 203; 570 N.W.2d 204 (1997); *Parret v. Unicco Serv. Co.*, 2005 OK 54; 127 P.3d 572 (2005); *McSwain v. Shei*, 304 S.C. 25; 402 S.E.2d 890 (1991); *In re Certification of Question of Law from United States Dist. Court*, 399 N.W.2d 320 (S.D. 1987); *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239; (Tenn. 2003); *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055; 176 Utah Adv. Rep. 11 (1991); *Mead v. Western Slate, Inc.*, 2004 VT 11, 176 Vt. 274, 848 A.2d 257 (2004); *Middlekauff v. Allstate Ins. Co.*, 247 Va. 150; 439 S.E.2d 394 (1994); *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190; 640 S.E.2d 540 (2006); *Birklid v. The Boeing Co.*, 127 Wn.2d 853; 904 P.2d 278 (1995); *Coleman v. American Universal Ins. Co.*, 86 Wis. 2d 615; 273 N.W.2d 220 (1979); *Wood v. Guam Power Auth.*, 2000 Guam 18 (2000); *Guzman-Cotto v. E.L.A.*, 156 D.P.R. 693; 2002 TSPR 59 (2002); *Robles v. Hovensa*, L.L.C., No. 2007/28, V.I. Sup., 49 V.I. 491 (2008). Notwithstanding, adjudication of claims involving the exclusivity provisions do not always provide the employee due process to determine the effectiveness of the administrative remedy provided by the Program in each case, or to determine if the Program provides an adequate substitute for the common law remedy.

Though state courts of last resort in Alabama, Colorado, Delaware, Massachusetts, and Wyoming have held that their respective jurisdictions allow common law claims for personal injury arising from intentional tort in the workplace, intentional tort claims can only be brought against co-employees, providing the employer with immunity, regardless of the liability of employer. *Busby v. Truswal Systems Corp.*, 551 So. 2d 322 (Ala.1989); *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001); *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157 (Del. 2000); *Doe v. Purity Supreme*, 422 Mass. 563; 664 N.E.2d 815 (1996); *Parker v. Energy Dev. Co.*, 691 P.2d 981 (Wyo. 1984)

The Pennsylvania Supreme Court has not only held that an employee can pursue a civil remedy under common law against a co-employee, but, where common law claims against the employer are questionable, a tort action cannot be dismissed until injury is found to be compensable under the Programs. *Heath v. Workers' Comp. Appeal Bd.*, 580 Pa. 174; 860 A.2d 25 (2004).

The Ohio Supreme Court has not only found that common law claims against an employer for intentional tort cannot be barred by the exclusivity provisions of the Programs, but further found a statute barring common law claims for intentional tort against an employer to be unconstitutional by violation of due process and equal protection provisions where the bar was without an "adequate substitute". *Brady v. Safety-Kleen Corp.*, 61 Ohio St. 3d 624; 576 N.E.2d 722 (1991); *Johnson v. BP Chems., Inc.*, 85 Ohio St. 3d 298; 1999 Ohio 267; 707 N.E.2d 1107 (1999); *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100; 522 N.E.2d 489 (1988).

The state courts of last resort in Florida, Georgia, Idaho, Oregon, and Vermont have held that an employee has the right to pursue a common law claim for civil remedy for personal injury arising from intentional tort, and further held that where the Programs do not provide adequate remedy, the exclusivity provisions thereof do not bar a common law claim against employer. *Jones v. Martin Elecs., Inc.*, 932 So. 2d 1100 (Fla. 2006); *Potts v. Uap-Ga Ag Chem*, 270 Ga. 14; 506 S.E.2d 101 (1998); *Kearney v. Denker*, 114 Idaho 755; 760 P.2d 1171 (1988); *Errand v. Cascase Steel Rolling Mills*, 320 Ore. 509; 888 P.2d 544 (1995); *Wolfe v. Yudichak*, 153 Vt. 235; 571 A.2d 592 (1989).

The Tennessee Supreme Court held that even though an employee was permanently disfigured by a personal injury which arose by accident out of and in the course of her employment, but for which she was not eligible for compensation because she did not lose wages, her only remedy was the Program, which would have provided her with limited benefits and no significant consideration for her personal injury in the workplace. *Clayton v. Pizza Hut, Inc.*, 673 S.W.2d 144 (Tenn. 1984).

This Court, the U.S. Court of Appeals and the Florida Supreme Court have specifically addressed the inapplicability of the exclusivity provisions of the Programs for claims of intentional tort such as sexual harassment. *Forrester v. White*, 484 U.S. 219; 108 S. Ct. 538; 98 L. Ed. 2d 555 (1988); *Hirase-Doi v. U.S. West Communs., Inc.*, 61 F.3d 777 (10th Cir. 1995); *Bator v. Hawaii*, 39 F.3d 1021 (9th Cir. 1994); *Byrd v. Richardson-Greenshields Secur., Inc.*, 552 So. 2d 1099 (Fla. 1989).

The U.S. Court of Appeals has also adjudicated common law claims against employers or co-employees in the jurisdictions of Arkansas, California, Florida, Illinois, Maryland, Mississippi, Louisiana, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and West Virginia, interpreting the applicable Programs, while analyzing the federal questions presented, and holding that intentional tort common law claims cannot be barred by the Programs because the Programs do not provide an adequate substitute. *Connolly v. Maryland Casualty Co.*, 849 F.2d 525 (11th Cir. 1988); *Hollman v. Liberty Mut. Ins. Co.*, 712 F.2d 1259 (8th Cir. 1983); *Gantt v. Sec., USA, Inc.*, 356 F.3d 547 (4th Cir. 2004); *Mullins v. Biglane Operating Co.*, 778 F.2d 277 (5th Cir. 1985); *Dunn v. Peabody Coal Co.*, 855 F.2d 426 (7th Cir. 1988); *Worthen v. Kennecott Corp.*, 780 F.2d 856 (10th Cir. 1985); *Wilson v. Asten-Hill Mfg. Co.*, 791 F.2d 30 (3rd Cir. 1986); *Pyle v. Dow Chemical Co.*, 728 F.2d 1129 (8th Cir. 1984); *Kuhnert v. John Morrell & Co. Meat Packing*, 5 F.3d 303 (8th Cir. 1993); *Subbe-Hirt v. Baccigalupi*, 94 F.3d 111 (3rd Cir. 1996); *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); *Larroquette v. Cardinal Health 200, Inc.*, 466 F.3d 373 (5th Cir. 2006); *Smith v. GMC*, 172 Fed. Appx. 661 (6th Cir. 2006); *Arthur v. E.I. Dupont de Nemours & Co.*, 58 F.3d 121 (4th Cir. 1995); *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657 (6th Cir. 2005); *Jensen v. County of Santa Clara*, 69 F.3d 544 (9th Cir. 1995).

The U.S. Court of Appeals has also adjudicated common law claims against employers in the jurisdiction of North Carolina, and, in consideration of the federal questions presented

therewith, held that an employee could pursue an intentional tort common law claim against an employer, and further that summary judgment for an employer is inappropriate where genuine issues of material fact and triable issues of fact exists as to the alleged intentional tort or intentional misconduct. *Wilent v. FMC Corp.*, 129 F.3d 118 (4th Cir. 1997). As N.C. Courts found in *Brown* and *Johnson*, it is well established that the N.C.W.C.A. acts as a legislative industrial accident insurance where only lost wages due to personal injury by industrial accident are compensable under the statutes. It is appropriate that N.C. Courts have held that, for all other claims against an employer or co-employee, an employee is not barred by the N.C.W.C.A. where the N.C.W.C.A. does not provide an effective administrative remedy. However, N.C. Courts have also permitted the dismissal of numerous common law claims against employers where the N.C.W.C.A. did not provide an effective administrative remedy, including the instant case. See *Ryles v. Durham County Hospital Corporation, Inc.*; 107 N.C. App. 455; 420 S.E.2d 406 (1992); *Richardson v. North Carolina Department of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996); *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 593 S.E.2d 416 (2004).

In consideration of the foregoing decisions and opinions of this Court, U.S. Court of Appeals, and every court of last resort of independent jurisdictions under the jurisdiction of the Constutition of the United States of America, Petitioner prays that this Court will consider this crucial federal question as to the rights of employees under the Programs.

III. Factual Background

Prior to 1999, the North Carolina General Assembly, the legislative branch of the State Government, mandated that all constituent institutions of the University of North Carolina System ("UNC System") inspect all facilities and provide a comprehensive report (Pet. App. 145a). In December 1999, a comprehensive report published by Respondent found that more than fifty (50%) percent of the facilities owned, operated and maintained by Respondent and commonly known as North Carolina State University (hereinafter referred to as "NCSU", in reference to the campus, facilities, and the entire student, staff and faculty community as opposed to Respondent) failed to meet building and safety code standards (Pet. App. 145a-150a). Reports also found systematic facility deficiencies at multiple campuses in the UNC System, including North Carolina Central University ("NCCU") and the University of North Carolina at Pembroke ("UNCP") (Record 32-175). The reports also identified insufficient or inadequate heating, ventilation and air conditioning systems ("HVAC Systems"), and that numerous facilities required mitigation of asbestos and lead paint (Record 32-175). The reports further represented that various facilities and programs were "unsafe" and posed risks to student, staff and faculty health and safety (Pet. App. 145a-150a).

It is undisputed that Petitioner enrolled at Respondent NCSU as a full-time student from August 1999 until May 2004 (Pet. App. 17a). In August 2002, Petitioner was offered and accepted employment with Respondent NCSU as a Resident Advisor, with compensation in the form of a stipend

below minimum wage, housing and other monetary and physical services, such as parking and spending allowances for meals (Pet. App. 17a-18a). Petitioner resided in the housing provided through employment as a Resident Advisor in Wood Hall from August 2002 to May 2003, and again from August 2003 to September 2003, and in Metcalf Hall from May 2003 to August 2003 (Pet. App. 17a-18a, 47a-50a). Prior to this period of employment, Petitioner enlisted with the United States Naval Reserve for a contract period of eight (8) years in July 2002 (Pet. App. 17a-18a, 47a-50a). Before enlisting, Petitioner was subject to a rigorous physical ability test, and an extensive physical exam, to determine if Petitioner was physically fit and medically qualified for military service, and the United States Navy Reserve determined that Petitioner was physically fit and medically qualified for military service prior to July 2002 (Pet. App. 17a-18a, 47a-50a; Record 32-175).

In October 2001, Petitioner suffered a chronic acute respiratory infection and tonsillitis, which condition persisted for approximately one month, however, no cause for this condition was identified (Record 32-175). In August 2002, petitioner suffered a chronic acute respiratory infection, along with interim periods of flu-like, bronchitis-like, and pneumonia-like chest congestion, migraine headaches, vomiting, severe weight loss, and tonsillitis, among other conditions, which conditions persisted until October 2003 (Pet. App. 17a-18a, 151a-153a). On October 7, 2002, Petitioner, along with maintenance staff of Respondent, identified chronic mold growth in the HVAC System in Wood Hall (Pet. App. 47a-50a, 151a-153a, Record 32-175). Maintenance staff represented, from experience, that

the air filter in the HVAC System unit in question appeared to be at least two (2) years old, though the air filters should have been changed at least every six (6) months (Pet. App. 151a-153a). This was documented in an administrative memorandum submitted to Respondent, which was included in the record (Record 32-175). Between May 2003 and August 2003, NCSU, as well as the rest of North Carolina, experienced unprecedented flooding, which floodwaters penetrated various NCSU facilities (Pet. App. 47a-50a, Record 32-175). In August 2003, multiple facilities were closed at NCCU and UNCP for mold growth and other health hazards, threats and risks (Record 32-175). Student, staff and faculty at NCSU questioned the difference in responses at NCCU and UNCP as compared to NCSU (Record 32-175). Employees of Respondent, including Petitioner, were instructed not to say the word "mold" to any students moving into on-campus facilities or their parents (Record 32-175).

On September 17, 2003, an article was published in a NCSU student publication about mold and other health hazards in NCSU facilities (Record 64-65). On the same day Respondents Timothy Luckadoo and Gary Thompson exchanged e-mail correspondence amongst other officers and employees of Respondent (Pet. App. 169a-170a). Respondent Timothy Luckadoo represented to superiors that Respondent's maintenance of the HVAC Systems and other alleged hazards was appropriate and within the prescribed duty of care owed to student, staff and faculty (Pet. App. 169a). However, Respondent Gary Thomspon represented that the conditions described in the article were common considering the age of the HVAC Systems,

and that it was common knowledge for facilities staff that the HVAC Systems needed to be replaced and suggested discussing such replacement (Pet. App. 170a).

On the same day, Petitioner was verbally threatened by Respondent and resigned from his position of employment, and vacated the premises in question (Pet. App. 47a-50a, Record 32-175). On September 24, 2003, Respondent sponsored a response to the initial article to correct any "misperceptions" or "incorrect information", without any reference to the observations or professional opinions of maintenance or facility staff (Record 64-68). Simultaneously, the State hired numerous third party and public servant experts to test the air quality and various surfaces throughout the facilities in question at NCCU and UNCP (Pet. App. 47a-50a, Record 32-175). Emergency construction and renovation projects were commenced in all facilities at NCCU and UNCP deemed infested with mold and other health hazards, but no emergency action was taken at NCSU (Pet. App. 47a-50a, Record 32-175).

Between September 2003 and December 2003, Petitioner, together with other student, staff and faculty at NCSU, authored a 145-page report as a rebuttal to Respondent's published response calling a "systematic" problem of health hazards a "misperception" (Pet. App. 47a-50a, Record 32-175). This 145-page report was hand delivered by Petitioner to the Respondent Office of the Governor of the State of North Carolina (hereinafter referred to as the "Governor") on January 21, 2004 (Pet. App. 47a-50a, 151a-153a; Record 32-175). On January 23, 2004, the Respondent North Carolina Department of Health and Human Services, on behalf of the

Respondent Governor, confirmed receipt and confirmed that the State would be initiating an investigation (Pet. App. 47a-50a, 151a-153a; Record 32-175).

At the same time, Respondent deceived and falsified information pertaining to this matter even to the authorities with executive oversight of occupational and health hazards. In a letter to the Respondent North Carolina Department of Labor, Respondent Tim Luckadoo represented that there were no systematic hazards, threats or risks to the health and safety of student, staff and faculty at NCSU, despite the representations of Respondent Gary Thompson, while specifically citing the administrative memorandum submitted by Petitioner to Respondent (Pet. App. 145a-177a). As a result, the North Carolina Department of Labor subsequently closed the case on this matter (Pet. App. 173a). At the same time, Respondent Timothy Blair represented that Wood Hall required renovation to ensure code compliance (Pet. App. 174a-177a)

Petitioner was honorably discharged from the United States Navy Reserve in June 2005 due to the acquisition of chronic respiratory conditions, primarily extrinsic asthma, and the early termination of this enlistment contract was caused by the medical disqualification of Petitioner for medical service and resulted in significant monetary damage to Petitioner (Pet. App. 17a-18a, Record 32-175). During this interim period, Respondent never conducted the investigation called by the Governor to the same standards used in the investigations and inspections at NCCU and UNCP, such as air quality or toxicity test (Pet. App. 145a-177a).

IV. Procedural History

Pursuant to the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291 et seq., Petitioner filed a certain affidavit of tort claim on December 30, 2005 (hereinafter the "Tort Claim") with the NORTH CAROLINA INDUSTRIAL COMMISSION (hereinafter referred to as the "Trial Court"), naming Respondent as committing negligence acts in the breach of Respondent's duty of care to Petitioner, which breach was the direct and proximate cause of injury to Petitioner (Record 2-5). The Trial Court is an executive administrative agency created by the North Carolina General Assembly pursuant to N.C. Gen. Stat. § 97-77, which is not part of the N.C. Courts, but is authorized to hear judicial claims as a trial court brought under the North Carolina Tort Claims Act and the N.C.W.C.A. by the power vested by the North Carolina General Assembly. See N.C. Const., art. I, § 6; N.C. Const. art. III, § 1; N.C. Const. art. III, § 11; N.C. Const., art. IV, § 1; N.C. Const. art. IV, § 3; N.C. Gen. Stat. § 7A-1 et seq.; N.C. Gen. Stat. § 143B-1 et seq.; *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

On March 9, 2006, Respondent timely filed an answer to the Tort Claim denying all guilt, and presenting three (3) affirmative defenses, which were N.C.W.C.A. exclusivity provisions based on Petitioner's employment with Respondent, statute of limitations, and contributory negligence, and simultaneously served Petitioner with a discovery request (Record 6-31). Petitioner responded to

Respondent's discovery request on May 1, 2006, and simultaneously served Respondent with a discovery request (Record 32-175). In said discovery request, Petitioner made reference to announced renovation of certain facilities owned, operated and maintained by Respondent which were identified as the direct and proximate cause of personal injury to Petitioner (Record 108-127). Petitioner also addressed all three (3) of Respondent's affirmative defenses by asserting, through sworn testimony and narrative responses, that (i) the personal injury of Petitioner was attributable to the negligence of Respondent during the time both before and after employment; the personal injury of Petitioner did not "arise" by "accident" "out of and in the course and scope of the employment"; and the personal injury of Petitioner was caused by the "intentional misconduct" of Respondent, which was defined as "misconduct substantially certain to cause serious injury or death" to Petitioner; (ii) the accrual of the personal injury of Petitioner occurred on June 9, 2005, even though Petitioner initiated a relationship with Respondent in August 1999, and Petitioner was diagnosed with the medical condition identified as the personal injury in question in November 2003, and (iii) Petitioner made every reasonable effort to meet or exceed his duty of care to himself, while at the same time Petitioner was deceived by Respondent, who provided misrepresentations as to the duty of care owed to Petitioner, and the hazards, threats and risks to Petitioners health, of which Respondent was aware (Record 108-127).

In an internal memorandum dated June 9, 2006, which Respondent provided to Petitioner through a public records requests, Respondent made

no mention of the affirmative defenses of statute of limitations or contributory negligence and counsel for Respondent questioned if the affirmative defense of N.C.W.C.A. exclusivity would be a "viable motion", but that it was being "considered" (Pet. App. 174a-175a). Respondent also began drafting a response to Petitioner's discovery request, which draft Respondent provided to Petitioner through public records requests, disclosing that Respondent intended to proceed with the renovations as scheduled during the proceedings, and that the renovations, announced by press release on January 31, 2006, after the filing of this claim, would provide substantial alteration of the heating, ventilation and air conditioning system ("HVAC System"), which was recommended by Petitioner and Respondent Gary Thomspon in 2003 (Pet. App. 176a-177a).

On July 20, 2006, Respondent filed a motion for summary judgment and motion for suspend discovery during the pendency of discovery exchange without providing a response to Petitioner's discovery request, in which Respondent abandoned the affirmative defenses of statute of limitations and contributory negligence and asserted the applicability of the N.C.W.C.A. and the exclusivity provisions thereof (Record 10-31). On August 11, 2006, Petitioner responded with a thorough response and a Cross-Motion to Compel Respondent to respond to Petitioner's discovery request, in which Petitioner provided Petitioner's entire discovery response, including exhibits, showing that there were genuine issues of triable issues as to the time, place, circumstance and nature of the personal injury in question (Record 32-175). Most relevant, Petitioner showed that (i) Respondent failed to show

that the injury in question "arose" by "accident" "out of and in the course and scope of the employment", (ii) Respondent was alleged to have committed "intentional misconduct" which was the direct and proximate cause of personal injury to Petitioner, (iii) the injury did not "arise" by "accident" "out of and in the course and scope of the employment", (iv) Petitioner was prejudiced by the suspension of discovery, and (v) there existed genuine issues of material fact and triable issues of fact as to all of the foregoing contentions (Record 32-175, 177-213). No significant or adequate findings of fact were made on the injury, and the Trial Court dismissed this Tort Claim with prejudice (Pet. App. 1a-13a).

Petitioner duly, timely and properly filed an appeal of right and petitions for extraordinary relief with the N.C. Court of Appeals asserting violation of constitutional rights to due process and equal protection under the law, pursuant to N.C. Gen. Stat. § 7A-29; N.C. Gen. Stat. § 7A-32 (Record 268-270). On October 30, 2007, Petitioner filed a Petition for Writ of Mandamus, Prohibition and Supersedeas, with an Incorporated Petition for an Immediate Change of Venue and New Trial with the N.C. Court of Appeals, seeking extraordinary relief given the renovation of the facilities in question and other misconduct by the Trial Court (Record 280). The N.C. Court of Appeals denied Petitioner's Petition by orders entered on November 14, 2007 (Pet. App. 14a-15a). On December 14, 2007, Petitioner duly, timely and properly filed the Record on Appeal with the N.C. Court of Appeals, which contained the questions for appellate review, which included questions challenging the actions of the Trial Court as a violation of the rights of Petitioner to equal

protection and due process of law under the Constitution of the State of North Carolina and the Constitution of the United States of America, primarily citing the provisions of the Fourteenth Amendment of the Constitution of the United States of America (Record 1-299). In pertinent part, these appellate questions contended that, after the course of due process where Petitioner and Respondent were afforded the opportunity to plead before the authorized administrative agency with statutory authority as a trial court, Petitioner was denied his right to due process in obtaining evidence relevant to these proceedings from the opposing party and incorrectly assigned a statutory classification without adequate evidence, in violation of the Fourteenth Amendment of the Constitution of the United States of America (Pet. App. 26a-43a; Record 293-297). Petitioner duly, timely and properly filed a brief in support of appeal with the North Carolina Court of Appeals, which provided further legal and factual support for the questions for appellate review (Pet. App. 26a-76a; Record 293-297). Respondent duly, timely and properly responded (Pet. App. 77a-88a). Petitioner moved the N.C. Court of Appeals to allow Petitioner to submit a reply brief, which motion was granted, due to the new questions Respondent raised in an attempt to disqualify evidence submitted by Petitioner (Pet. App. 89a-99a). The N.C. Court of Appeals allowed Petitioner's reply brief in which Petitioner asserted the summary judgment hearing provided all parties wih the opportunity to present any and all evidence in support of the assertions and defenses made at the hearing (Pet. App. 89a-101a).

On May 20, 2008, the Court of Appeals entered an order affirming the dismissal of this Tort Claim, citing that the findings and conclusions of law are conclusive if supported by the competent evidence, and further finding that it was not necessary to address the remaining assignments of error presented by Petitioner (Pet. App. 16a-22a).

Petitioner duly, timely, and properly filed a Notice of Appeal of Right, Petition for Discretionary Review, and Petition for Writ of Supersedeas with the N.C. Supreme Court again asserting violation of constitutional right to due process, pursuant to N.C. Gen. Stat. § 7A-30; N.C. Gen. Stat. § 7A-31; N.C. Gen. Stat. § 7A-32. (Pet. App. 102a-134a). Respondent filed a Motion to Dismiss the Appeal in response (Pet. App. 135a-144a). Despite this pending appeal during this correspondence exchange, Respondent referred to this Tort Claim as "failed". (Pet. App. 161a-162a). On August 22, 2008, Petitioner filed a Motion for Temporary Stay, Motion to Amend the Record on Appeal and Motion to Expedite the Appeal, together with 481 pages of documentation obtained in response to the request for public information and public records (Pet. App. 23a-25a, 156a-160a). The N.C. Supreme Court granted Respondent's Motion to Dismiss the Appeal and denied all of the Petitioner's petitions contemporaneously on September 4, 2008 (Pet. App. 23a-25a). The N.C. Supreme Court is the court of last resort in the State of North Carolina and is the court of original and supreme appellate jurisdiction. See N.C. Const. art. IV; N.C. Gen. Stat. § § 7A-25, 7A-26. The order of the North Carolina Supreme Court is final, and dismisses this matter in all respects (Pet. App. 23a-25a).

JUSTIFICATION FOR GRANT OF THIS WRIT

I. Petitioner duly, timely and properly presented a federal question in these proceedings and the federal question was maintained throughout these proceedings to the state court of last resort.

In the course of due process in civil proceedings in adjudication of a common law claim for remedy, Petitioner and Respondent were entitled to seek evidence, file pleadings, and prepare for trial by jury for the purpose of seeking remedy and defending life, liberty and property in the interest of justice. Both Petitioner and Respondent exercised this right in the initiation of the proceedings, service of discovery requests, and pleadings addressing the subject matter jurisdiction of the Trial Court to hear this Tort Claim (Record 1-261). Upon the dismissal of this Tort Claim without the close of evidence and substantial and adequate findings of fact on the personal injury in question, the rights of Petitioner for due process and equal protection were violated (Pet. App. 26a-76a). Immediately upon appeal from the Trial Court to the N.C. Court of Appeals, Petitioner presented the provisions of the Constitution of the United States of America that were violated by the actions taken by the Trial Court (Pet. App. 26a-76a). No constitutional challenge to the relevant statutory provisions was presented, as it is well established that the relevant statutory provisions, when invoked as contemplated by the applicable legal precedents, comports with the provisions of the Constitution of the United States of America and the Constitution of the State of North

Carolina (Pet. App. 26a-76a). This constitutional challenge asserts that Petitioner was denied due process of law and equal protection under the law upon the improper dismissal of this Tort Claim before the Trial Court (Pet. App. 26a-76a). Petitioner presented questions as to the right to due process as guaranteed by the relevant provisions of the Fourteenth Amendment of the Constitution of the United States of America, which guarantees Petitioner the rights incorporated by reference in the Fifth Amendment and Seventh Amendment of the Constitution of the United States of America. Furthermore, the same rights, privileges and protections are guaranteed by Sections 5, 18 and 19 of Article I of the Constitution of the State of North Carolina. See U.S. Const. amend. V.; U.S. Const. amend. VII; U.S. Const. amend. XIV § 1; N.C. Const. art. I, § 5; N.C. Const. art. I, § 18; N.C. Const. art. I, § 19. (Pet. App. 26a-76a).

The N.C. Courts passed on this federal question by inexcusably failing to adjudicate Petitioner's duly presented objections, failing to adjudicate the exceptions to the exclusivity provisions of the N.C.W.C.A., and failing to adjudicate the federal questions presented as arising therefrom (Pet. App. 1a-144a). In the instant case at bar, while there is no controversy over the employment relationship between Petitioner and Respondent, the controversy presented is the time, place, circumstances and nature of the injury in question (Pet. App. 26a-76a). In addressing this question, the N.C. Courts have held that findings of fact must be made with respect to the injury, and the injury must be found to arise by industrial accident (Pet. App. 26a-76a).

II. The North Carolina Supreme Court passed on this federal question

In passing on this federal question, the N.C. Court of Appeals failed to exercise the proper standard of appellate review, which holds that the standard of review of a federal question before the N.C. Courts is the same as the standard of review for this Court. See *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996); *Duggins v. N.C. State Bd. of CPA Examiners*, 294 N.C. 120, 240 S.E.2d 406 (1978); *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 446 S.E.2d 332 (1994); *In re Assessment of Use Taxes Against Village Publishing Corp.*, 312 N.C. 211, 322 S.E.2d 155 (1984) appeal dismissed, 472 U.S. 1001, 86 L. Ed. 2d 710, 105 S. Ct. 2693 (1985); *Powe v. Odell*, 312 N.C. 410, 322 S.E.2d 7624 (1984); *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983).

The judgment from the N.C. Court of Appeals found that the findings of the Trial Court were conclusive on appeal, but did not exercise an independent jurisdiction to examine if the official actions of the State were repugnant to the provisions of the Constitution of the United States of America (Pet. App. 1a-144a). It is well established that the federal courts have an independent jurisdiction in the administration of state laws, coordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. This Court adopts the construction of state law as determined by the state court of last resort, for a federal challenge of constitutionality of the state law, but has independent authority to examine if state law or

official state action is repugnant to the provisions of the Constitution of the United States of America. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 30 S. Ct. 140, 54 L. Ed. 228 (1910); *Cook v. Moffat & Curtis*, 46 U.S. 295, 12 L. Ed. 159 (1847); *Burgess v. Seligman*, 107 U.S. 20, 2 S. Ct. 10, 27 L. Ed. 359 (1882); *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U.S. 532, 24 S. Ct. 576, 48 L. Ed. 778 (1904); *Yazoo & M. V. R. Co. v. Adams*, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901); *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 48 S. Ct. 489, 72 L. Ed. 801 (1928); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940).

Notwithstanding contentions that the findings of fact and conclusions of law were not supported by the competent evidence, Petitioner duly, timely and properly sought appellate review by the N.C. Supreme Court (Pet. App. 102a-134a). In Respondent's Motion to Dismiss the Appeal filed with the N.C. Supreme Court, Respondent moves for dismissal based on grounds that no constitutional question was presented (or no constitutional question with merit was presented) (Pet. App. 135a-144a). All of Respondent's contentions are without merit (Pet. App. 26a-144a). Petitioner contends, and the record shows, that substantial and crucial constitutional questions were timely presented immediately following the official state action from which the constitutional question arose (Pet. App. 1a-144a). Notwithstanding the grounds for dismissal of the appeal, the N.C. Supreme Court has passed on this federal question (Pet. App. 1a-25a).

III. This Court has an independent jurisdiction to review this matter on appeal and should grant this Writ

Administrative proceedings are due process for the purposes of judicial review. *Lerner v. Casey*, 357 U.S. 468, 78 S. Ct. 1311, 2 L. Ed. 2d 1423 (1958).

The Constitution of the United States of America, and applicable statutory authority, gives this Court appellate jurisdiction to review this federal question. See *Lytle v. Ark.*, 63 U.S. 193, 16 L. Ed. 306 (1859); *El Paso & S. R. Co. v. Eichel & Weikel*, 226 U.S. 590, 33 S. Ct. 179, 57 L. Ed. 369 (1913); *Union Mut. Life Ins. Co. v. Kirchoff*, 169 U.S. 103, 18 S. Ct. 260, 42 L. Ed. 677 (1898).

In reviewing state court judgments under 28 U.S.C. § 1257, the United States Supreme Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court has been asked to review. When the highest state court is silent on a federal question before it, the Supreme Court of the United States assumes that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented. *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997). However, the opinion of the state court constitutes no part of the record, for the purpose of determining whether the United States Supreme Court will re-examine its final judgment or decree. *Gross v. United States Mortg. Co.*, 108 U.S. 477, 2 S. Ct. 940, 27 L. Ed. 795 (1883).

Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, the United States Supreme Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court. *Staub v. City of Baxley*, 355 U.S. 313; 78 S. Ct. 277; 2 L. Ed. 2d 302 (1958); *National Exchange Bank v. Wiley*, 195 U.S. 257, 25 S. Ct. 70, 49 L. Ed. 184 (1904); *Cooper v. Newell*, 173 U.S. 555, 19 S. Ct. 506, 43 L. Ed. 808 (1899).

State policy must give way when it operates to hinder vindication of federal constitutional guaranties. See *North Carolina State Board of Education et al. v. Swann et al.*, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971); *United States v. Cruikshank et al.*, 92 U.S. 542, 23 L. Ed. 588 (1876); *United States v. Scotland Neck City Board of Education et al.*, 407 U.S. 484; 92 S. Ct. 2214, 33 L. Ed. 2d 75 (1972).

The standard of review is to examine the specific facts of the instant case and determine if Petitioner was deprived of equal protection, given that private biases are outside the real of the law, but official state action cannot, directly or indirectly, give such biases effect. *City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc., et al.*, 473 U.S. 432; 105 S. Ct. 3249; 87 L. Ed. 2d 313 (1985); *McLaughlin et al. v. Florida*, 379 U.S. 184; 85 S. Ct. 283; 13 L. Ed. 2d 222 (1964); *Loving v. Virginia*, 388 U.S. 1; 87 S. Ct. 1817; 18 L. Ed. 2d 1010 (1967).

Indeed, this crucial federal question arises primarily due to the conclusions of law holding that

the Trial Court made "no determination as to the merits of" Petitioner's claims under N.C.W.C.A. (Pet. App. 1a-25a). This conclusion of law is expressly in conflict with the decisions of this Court, primarily *New York C. R. Co. v. White*, and various other relevant decisions of the U.S. Court of Appeals and other state courts of last resort. 243 U.S. 188.

CONCLUSION

In consideration of the foregoing, Petitioner shows this Court should grant this petition for a writ of certiorari.

This the 19th day of December 2008.

Respectfully submitted,

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